



The Huntington National Bank

Legal Department
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January 30, 2004

By e-mail to: regs.comments@federalreserve.gov

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Attn: Docket Number R-1167 (Truth in Lending)
Docket Number R-1168 (Equal Credit Opportunity)
Docket Number R-1169 (Electronic Fund Transfers)
Docket Number R-1170 (Consumer Leasing)
Docket Number R-1171 (Truth in Savings)

Re: Proposed Changes to Regulations Z, B, E, M and DD

Dear Ms. Johnson:

This letter is submitted on behalf of The Huntington National Bank, a national banking association, and its parent company, Huntington Bancshares Incorporated, a financial holding company (both entities referred to as "Huntington")¹ in response to the above referenced proposed changes to Regulations Z, B, E, M and DD, and the official staff commentaries under each of them (the "Proposal"), published by the Board of Governors of the Federal Reserve System (the "Board") on December 10, 2003. Huntington appreciates the opportunity to comment on the Proposal.

The Proposal would revise the standard for "clear and conspicuous" disclosures as required by each of these regulations, as well as in the case of Regulation Z make certain other

¹ The Huntington National Bank ("Huntington Bank") is the principal subsidiary of Huntington Bancshares Incorporated, which is a \$30 billion regional bank holding company headquartered in Columbus, Ohio. Along with its affiliated companies, Huntington Bank has more than 138 years of serving the financial needs of its customers, and provides innovative retail and commercial financial products and services through more than 300 regional banking offices in Indiana, Kentucky, Michigan, Ohio and West Virginia. Huntington Bank also offers retail and commercial financial services online at www.huntington.com; through its technologically advanced, 24-hour telephone bank; and through its network of nearly 700 ATMs. Selected financial service activities are also conducted in other states including: dealer sales offices in Florida, Georgia, Tennessee, Pennsylvania and Arizona; private financial group offices in Florida; and mortgage banking offices in Florida, Maryland and New Jersey. International banking services are made available through the headquarters office in Columbus and additional offices located in the Cayman Islands and Hong Kong.

changes. Our comments relate to the revised "clear and conspicuous" disclosure standard. For the reasons more fully explained below, we strongly urge the Board to withdraw the portion of this Proposal that would change the "clear and conspicuous" standard. This change is not supported by any demonstrated need or benefit to consumers, and will involve substantial costs to financial institutions, and ultimately to consumers.

Except for a minor wording difference in Regulation E ("clear and readily understandable") which has not historically been considered to have a different meaning than "clear and conspicuous", the "clear and conspicuous" standard has been settled law for approximately 35 years since the first of these consumer laws and their accompanying regulations—the Truth in Lending Act and Regulation Z—became law. The first general change to this standard occurred with the privacy regulations issued under the Gramm-Leach-Bliley Act ("GLBA"), and now the Board is proposing to convert all of these other consumer regulations to the "clear and conspicuous" standard contained in the GLBA privacy regulations. While we appreciate the Board's express statement of wanting "to provide a more uniform standard", that goal is misplaced in this context, considering the wide scope and variation of the disclosure requirements contained in these regulations. This is simply not a situation where "one size fits all".

The issue here is not whether disclosures should or should not be clear and conspicuous. Huntington firmly supports the requirement—as it has existed for the last 35 years—that consumer disclosures be clear and conspicuous. The issue is rather whether the existing flexible standard should be made more detailed, specific and complex. While we believe this Proposal is well-intentioned, it would nonetheless create much harm and little or no good for both financial institutions and consumers, and thus we are urging the Board to withdraw it for all of the reasons set forth below:

First, the Board cites no evidence of any problem with the existing "clear and conspicuous" standard, which has a long and established history in these consumer regulations. With a change as far-reaching and adverse as this one, there should be an important reason why it needs to be done or a significant problem that it is solving—none of which is present here.² The supplementary information in the Proposal suggest the following two reasons for this change: (i) that the GLBA standard in the privacy regulations is more precise and therefore presumably provides better guidance to financial institutions about how to make disclosures clear and conspicuous, and (ii) extending that standard to the other consumer regulations would facilitate compliance by providing greater consistency. However, there is no indication that financial institutions need better guidance on this point, and as discussed below, more precision

² Ironically, the regulations which have created the most controversy over clarity are the privacy regulations issued under GLBA, and it is the wording and standard from the privacy regulations that the Board is now proposing to export to its other consumer regulations. The Board and other federal banking regulators have published an advanced notice of proposed rulemaking with respect to each of their privacy regulations under GLBA asking whether these regulations should be amended to provide alternative privacy notices "that would be easier for consumers to understand" and further to determine how privacy notices "could be made more useful to consumers". 68 *Fed. Reg.* 75164 (Dec. 30, 2003).

in the rule extended to these other consumer regulations creates significant problems of execution and ultimately of understanding by consumers. Moreover, as already indicated above and discussed in more detail below, this is not a context where consistency among the regulations is necessary or beneficial to financial institutions or consumers.

Second, the disclosures required under the GLBA privacy regulations, from which this new wording and standard would be imported to these other consumer regulations, are generally self-contained on their own form, and do not have the scope and diversity that is characteristic of the many disclosures required by these other five consumer regulations. For example, disclosures required by Regulations Z and M must appear in advertising, on billing statements, on segregated disclosure documents, and in integrated documents where the disclosures are interspersed with contract terms and/or state disclosures. Regulation B requires disclosures on application forms and in adverse action letters. Regulations E and DD require disclosures in advertising, billing statements, written and oral notices, ATM receipts and screen messages, and interspersed in contract documents with contract terms and state disclosures. Rules that work for a single separate disclosure document focussed on one subject, as is the case with the privacy regulations under GLBA, will not smoothly translate to the multiple disclosure topics, contexts and formats required by these other five consumer regulations.

Third, the "designed to call attention" portion of the proposed new standard is particularly troublesome in the context of these five consumer regulations and becomes a *de facto* segregation requirement, notwithstanding that these regulations (except where otherwise specifically required) allow disclosures to be interspersed with other information. For example, in a document that combines disclosures with other information, such as contract terms, this new standard requires that the institution "use distinctive type size, style, and graphic devices, such as shading or sidebars, to call attention to the disclosures". Simply as a drafting exercise, this will be difficult to do where disclosures are intermingled with contract text, such as in the initial open-end credit disclosures required for credit cards or home equity credit lines by §226.6 of Regulation Z or in a vehicle lease document for the Regulation M disclosures that are not required to be segregated by §213.3(a)(2) of Regulation M. Effectively, this becomes a new segregated disclosure requirement for all disclosures because as a practical matter it will be distracting and overly busy in appearance (and thus arguably *not* clear and conspicuous) to have distinctive type, shading or the like in multiple places all over a document, with the chance that some contract reference to the same topic will be considered to be a disclosure omitted from the distinctiveness now required by this new standard, or that some important contract term that is not a required disclosure will be obscured by the bolding and shading applicable to the disclosure provisions. Issues like this do not exist with respect to this standard under the GLBA privacy regulation because it is a self-contained document addressing a single topic and not interwoven with contract terms. Furthermore, it is questionable whether the Board has the legal authority under the governing statutes for these five regulations to impose what is in effect a segregation requirement for all disclosures. The current segregation requirements that do exist under Regulation M and Regulation Z are imposed by statute, and the Board would appear to need statutory authority to move these regulations in that direction.

Fourth, this new “clear and conspicuous” standard is overly technical and unnecessarily specific. Regulation Z, for example, in existing §226.5(a)(2) and §226.17(a)(2), has a requirement that certain disclosures be “more conspicuous” than any other disclosure. How does this existing “more conspicuous” requirement relate to the new technical and specific “designed to call attention” standard applicable to all disclosures? In essence, the “designed to call attention” standard is not a just “clear and conspicuous” standard, but a “*more* clear and conspicuous” standard, with uncertainty about what it is to be *more* clear and conspicuous than. This invites conflict, not only with the “more conspicuous” requirements already existing in some of these regulations, but also with state and other federal law conspicuousness requirements and with other important contract language which is not included within applicable disclosure topics. Additionally, the “designed to call attention” standard will require plain-language headings for each disclosure, which at a minimum will require reorganization of text in many disclosure documents and present the drafter with the challenge of dealing with the same subject matter under multiple headings, since not all of the contract language about a given topic will be required disclosure language, and the two will apparently have to be separated under different headings, making for duplication of text on the same subject, which is arguably *less* clear and conspicuous. Moreover, this “designed to call attention” standard now generally brings back to these consumer regulations a technical requirement that was for very good reason abandoned with Truth in Lending simplification in 1980—type size requirements.³ While the proposed language does not literally say that 12-point type is required, it does effectively say that less than 8-point type is prohibited, and financial institutions desiring to avoid the costs and risks of unnecessary litigation are certainly likely to revise their disclosures to 12-point type in order to be sure of the apparent safe-harbor on type size which the Board is establishing. This 12-point type requirement applied across the diversity and scope of these consumer regulations will be a significant problem, including, for example, disclosures in newspaper advertisements, the finance charge balance disclosure on the back of a credit card billing statement, disclosures on ATM receipts and the disclosure about alimony or child support in a credit application.⁴ The result of a 12-point disclosure requirement for a vehicle lease or a home equity credit line agreement, for example, will, together with other “designed to call attention” requirements, such as “plain-language headings” and “wide margins and ample line spacing”, result in documents that are significantly larger or longer than they are now, which effectively becomes another reason to segregate the disclosures—or even put them into a separate document—in order to be able to comply.⁵

³ In 1981 in the context of revised Regulation Z, the Board recognized that a disclosure could be clear and conspicuous without a type size requirement: “The revised regulation retains the standard that disclosures be made clearly and conspicuously, but deletes the sequence and type size requirements as being unnecessary in light of the general rule.” 46 *Fed. Reg.* 20848 (Apr. 7, 1981) (preamble discussion of §226.5).

⁴ Type-size requirements as a readability factor relate primarily to paper documents, and become less relevant to electronic disclosures, where formatting options, such as links or pop-ups, or technical options, such as the user’s ability to increase or decrease the size of information on the screen, provide alternatives not available in a paper format. Type-size requirements clearly have no relevance to oral disclosures.

⁵ Separating disclosures onto separate documents is not a favored practice under these consumer regulations, since it creates potential liability if the signing or delivery of the documents gets out of order. For example, under Regulation Z, if the consumer signs the promissory note or loan agreement before receiving a separate disclosure

Fifth, particularly because of the “designed to call attention” requirements of this Proposal, financial institutions will necessarily have to provide consumers with significantly more disclosure material than under the current rules. Documents containing disclosures will become much longer, or the financial institution will segregate the disclosures onto separate documents, all of which will mean more volume of print and paper delivered to the consumer. While each individual disclosure may be easier to read,⁶ the sheer volume and size will actually discourage consumers from paying attention to what they are given and make it harder to find what they are looking for in the increased bulk delivered to them. On a smaller scale, this is essentially the problem the public has been complaining about with the privacy disclosures, and it is counterproductive for the Board to be moving in the opposite direction with this Proposal.

Sixth, it appears likely that this Proposal will require every financial institution to evaluate, review, redraft, redesign, reprogram and reprint every single one of its disclosure documents, billing statements, notices, ATM receipts and the like which contain disclosures required by these five consumer regulations in order to meet these new “designed to call attention” and other requirements. For Huntington, we estimate that cost to be several million dollars, not to mention the diversion costs of a comprehensive redisclosure project on other business initiatives. For the financial services industry the cost will almost certainly be in the billions of dollars. The cost for us will be most extensive in connection with indirect motor vehicle financing, which, at least at the present time, still utilizes printed paper disclosures/contracts and requires reprogramming (at the bank’s cost) of dealer software that prints the numbers that fill in the blanks on the forms. However, even with documents that are generated at the point of transaction by laser printers, significant programming time and resources, in competition with other projects and initiatives, will be required to modify the forms. Modifications to billing statements will be especially programming intensive, and are likely to increase the number of pages, and thus the postage costs for billing statements will be permanently increased by this Proposal. Additionally, significant amounts of legal and compliance time will be needed to review existing forms and redraft them to attempt to comply with these new requirements. It is difficult not to see all of this as a very large waste of institution money and resources when, as here, there is no reason or problem driving this change. In the highly competitive market for financial services where each institution is striving to make its earnings projections, these extra costs and distractions from the business of providing financial services and products to customers will be economically harmful with no corresponding benefit or need for all this effort.

document (usually evidenced by signing an acknowledgment of receipt), a disclosure violation has occurred. Putting the disclosures into the same piece of paper as the promissory note or loan contract avoids order of document violations. Putting them in the same document also helps to insure that the disclosure document is not overlooked or forgotten.

⁶ It is our understanding, however, that there is a point of diminished returns for type size, and that readability increases to an optimum type size, but then declines as letters become larger than the optimum. In addition, color contrast, background, spacing, margins, width of line, formatting and other issues can affect readability as much or more than type size. While the Board may intend to recognize the multitude of factors that enhance readability, reference to individual factors in the “designed to call attention” requirement will become an invitation for lawyers to focus on the absence of certain individual factors in challenges to compliance with the proposed new standard.

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Seventh, this proposal will invite costly and unnecessary litigation over technical compliance. There is no private right of action under the privacy requirements of GLBA and its implementing regulations. Quite the contrary is the case with these other consumer regulations (except for Regulation DD). The degree of compliance with this new standard will be measured in the eye of each beholder, and each and every disclosure will be an opportunity to engage in non-substantive litigation over the technicalities of this new "clear and conspicuous" standard: whether "wide" margins are wide enough or "ample" line spacing is ample enough or whether some disclosure language is contained in contract terms that are not in "distinctive" type or under appropriate headings or whether disclosures required to be "more conspicuous" distract from calling attention to other disclosures, and so forth. Even if financial institutions are successful in defending such litigation, the costs of defense will be substantial, and in many cases, because of the factual nature of the issues, there will be a material incentive for financial institutions to settle cases for large dollar amounts rather than risk uncertain factual determinations by judges or juries. In 1981 when the Board was revising Regulation Z to implement Truth in Lending simplification, the Board recognized that "highly complex and technical requirements . . . produced disclosures that sometimes obscured the important information to consumers, and generated costly and burdensome litigation over technical interpretations of the regulation." 46 *Fed. Reg.* 20848 (Apr. 7, 1981). The same criticism is relevant to the current Proposal.

For all of these reasons, we urge the Board promptly to withdraw the portion of the Proposal that would revise the "clear and conspicuous" requirement for Regulations Z, B, E, M and DD. If you have any questions about this letter, you may contact me at 614-480-5760 or dan.morton@huntington.com.

Very truly yours,



Daniel W. Morton
Senior Vice President & Senior Counsel